IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-550



PERALTA FEDERATION OF TEACHERS, LOCAL 1603, AMERICAN FEDERATION OF TEACHERS, AFL-CIO, et al.,

Petitioners,

vs.

PERALTA COMMUNITY COLLEGE DISTRICT, et al.,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of California

# REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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## SUMMARY OF ARGUMENT

Respondent (hereinafter the "District"), has devoted sixteen pages of its Brief in Opposition (hereinafter "Opposition Brief") to the proposition that this Court does not have jurisdiction under 28 U.S.C. § 1257 (3). The District asserts that Petitioners (hereinafter the "Teachers") waived the constitutional issues asserted here. The District has pursued this proposition energetically but in a manner that obscures the real issues.

Admittedly, the Teachers treated the issue very concisely in the Petition for Writ of Certiorari (hereinafter "Petition"). But we did clearly state the factual predicates of jurisdiction and we did identify without ambiguity the determinative principle of California law. Instead of squarely facing these points, the District has chosen to try to distract the Court with an irrelevant mass of truisms of California law 1/ and with demonstrably false propositions of United States constitutional law. 2/

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1/ E.g., that "a Rehearing Will Not Be Granted on Points Newly Raised." Opposition Brief, p. 22. The Teachers have never denied this and have expressly predicated preservation of the constitutional issues on a different principle.

2/ E.g., "This Court Has No Jurisdiction to Decide Federal Constitutional Issues Which Were Not Raised and Decided in the California Appellate Courts." Opposition Brief, p. 24 (emphasis added). Obviously, the failure of a (footnote continued)

Curiously, the District fails to address the critical point of California law stated in the Petition, viz., that raising a constitutional issue in a Brief before the California Court of Appeal is sufficient to preserve that issue for consideration by the California Supreme Court. Petition, p. 11.

Rather than deal with the District's collection of points ad seriatim, the Teachers will focus this Reply on the following propositions:

First, the Teachers raised their Equal Protection objection to classifying long-term part-time employees as "temporaries" without rights in their initial presentation to the California Court of Appeal, the "Opening Brief of Cross-Appellants and Reply Brief of Respondents" (hereinafter "Opening Brief of Cross-Appellants").

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2/ (continued from page 1) California Court to expressly address an issue cannot preclude this Court from review if the issue was raised. Chambers v. Mississippi, 410 U.S. 284, 290 n. 3 (1973) ("[D]espite the State Supreme Court's failure to address the constitutional issue, it is clear that Chambers' asserted denial of due process is properly before us.").

Second, as a matter of California law, presentation of the issue in that manner in that forum was sufficient to preserve the issue for the consideration of the California Supreme Court.

Third, at no time did the Teachers affirmatively disclaim the constitutional issue.

These three points are sufficient to demonstrate that this Court has jurisdiction over the Equal Protection questions presented.

For the most part, the Teachers are content to rest upon their statement of the constitutional questions in their Petition, and have little to add here. But since the District has chosen to so confuse matters in its Brief, it may be useful for the Teachers to briefly bring the real Equal Protection issues back into focus.

## ARGUMENT

### I. THE COURT HAS JURISDICTION UNDER 28 U.S.C. § 1257 (3) BECAUSE THE TEACHERS PRESERVED THE CONSTITUTIONAL ISSUES IN A MANNER PRESCRIBED BY CALIFORNIA LAW

#### A. The Teachers' Equal Protection Argument Was Raised in a Timely Manner Before the California Court of Appeal

## 1. Background.

The relationship between two interests asserted by the Teachers in this litigation has been a source of some confusion. The part-time teachers sought both to be granted equal access to tenure and to receive equal pay with full-time teachers (i.e., to be paid on a pro rata basis). The District's practices, pursuant to California law, has denied them both.

Because the Teachers considered that they had both statutory and constitutional bases for each of these interests, they pressed all of these claims in the Trial Court. At the conclusion of the Trial Court's consideration of the case, however, they had prevailed--strictly on statutory grounds--on the tenure claim, but had lost on their pro rata pay claim. (The Superior Court's Findings of Fact and Conclusions of Law are reproduced in the Appendix to Petition for Writ of Certiorari (hereinafter "Appendix"), pp.67-75, 77; see also the Judgment, Appendix p. 62.)

Because divergent results on these two related issues seemed anomolous to the Teachers--and because they had prevailed on statutory grounds on the tenure issue at the Trial level--the Teachers, in the Court of Appeal, emphasized the pro rata pay discrimination and the relationship between tenure and pay.

As the District states and quotes (Opposition Brief at 16-17), the Teachers did argue in the Opening Brief of Cross-Respondents, that, given the

finding of tenure, pro rata pay was statutorily and constitutionally compelled. The Teachers did not rest their claim to tenure exclusively on statutory grounds.

2. The Teachers presented a clear, constitutionally-based claim to tenure.

In a passage from the Teachers' Opening Brief of Cross-Appellants before the Court of Appeal (quoted in the Petition, p. 11), the Teachers expressly stated that discriminating against part-time teachers in terms of "classifications, employment security and other terms and conditions of employment", as well as pay, was irrational and therefore violated both State and Federal Constitutions. In more abbreviated form, we quote that same passage from that Court of Appeal brief here:

> The test for determining the validity of a statute under state law is substantially the same as under the equal protection clause of the Federal Constitution....Stated another way, [under] the Fourteenth Amendment...[,] creating classes or groups and treating them differently must be based on rational distinctions....
>
> ....
>
> The District's singling out part-time persons for inferior treatment in terms of pay, classification, employment security and other terms and conditions of employment...is... irrational.

Opening Brief of Cross-Appellants, pp. 36-37 (emphasis added).

B. The Teachers' Equal Protection Argument Was Properly Before the California Supreme Court Because, as a Matter of California Law, Briefs to the Court of Appeal Are Part of the Legal Argument Before the California Supreme Court Whenever That Court Grants a Hearing.

California's Supreme Court, its Court of last resort, like this Court, has an essentially discretionary appellate caseload. Aggrieved parties have an appeal of right to the intermediate Court, the California Court of Appeal, but the California Supreme Court largely selects its own caseload on the basis of the importance of the issues.3/

When the California Supreme Court accepts a case for review (a procedure referred to in California as "transferring" the case to the Supreme Court, see generally 5 Cal.Jur. 3d, Appellate Review, § 427), all the decisions and orders of the Court of Appeal--but not the record or the briefs before it--are nullified.

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3/California's Rules of Court provide in relevant part: Rule 29. Grounds for Hearing in Supreme Court. (a) [Grounds] A hearing in the Supreme Court after decision by a Court of Appeal will be ordered (1) where it appears necessary to secure uniformity of decision or the settlement of important questions of law; (2) where the Court of Appeal was without jurisdiction (footnote continued)

Krouse v. Nimocks, 8 C.2d 482, 483, 66 P. 2d 438 (1937). As the respected and oft-cited California authority Witkin has stated: "The case is then 'at large,' i.e., to be decided on the entire record and all the issues, as if originally appealed to the Supreme Court, regardless of the ground relied upon in granting the hearing." Witkin, California Procedure, 2d Ed. (1971), Appeal § 617. Accord 5 Cal. Jr. 3d, Appellate Review § 434.

Consistent with these principles, the California Supreme Court--unlike this Court--has no procedure for the parties to routinely file additional briefs after the case has been transferred. Rather, the California Rules of Court merely provide that the papers filed in the Court of Appeal action, including "the original record, briefs, and all original papers and exhibits on file in the cause", are retained by the California Supreme Court and given the new number of a Supreme Court case. Rule 28(b); Witkin, supra, § 613. The only other procedure, specified in the Rules of Court, governing matters to occur after the hearing is granted, is section (f) of Rule 28: "When a hearing is granted, the cause shall be placed on the calendar for oral argument, unless oral argument is waived."

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3/ (continued from page 6) of the cause; or (3) where, because of disqualification or other reason, the decision of the Court of Appeal lacks the concurrence of the required majority of qualified judges.

Of course, as a practical matter, there is a great deal of overlap between an argument which addresses the reasons for granting a hearing, and one which deals with the merits. But as a matter of law, the Petition for Hearing is required to be addressed to the reasons for granting the hearing, and not specifically to the merits. See 8 California Practice (1968), Appeals, § 61:392. And the failure of California's procedure to provide for additional briefs once the case is accepted by the Supreme Court is not prejudicial precisely because the Court of Appeal briefs are themselves considered to be before the Supreme Court once a petition is granted. Thus, the fact that the constitutional issue raised in the Teachers' California Court of Appeal briefs were properly preserved follows from the basic procedural structure of California appellate law.

The conclusion that the Teachers did not waive their constitutional objections does not rest only on inferences from the general practices of California appellate procedure or upon the opinion of scholarly authorities. The issue has been squarely faced by the California Supreme Court and resolved most recently in Menchaca v. Helms Bakeries, Inc., 68 Cal.2d 535, 67 Cal.Rptr. 775, 439 P.2d 903 (1968).

The Court, speaking through Mr. Justice Trobiner, held as follows:

> Although plaintiffs did not raise the issue of negligent equipage in their petition for

> hearing, the question was briefed by both parties and may be reviewed by this court. An order granting a petition for hearing transfers the entire cause here, and the case is then to be decided on all issues, as if originally appealed to this court, regardless of the grounds relied on in the petition.
>
> 68 Cal.2d at 541 n. 1, 67 Cal.Rptr. at 779 n. 1, 439 P.2d at 907 n. 1. (citations omitted.)

In accord with the practice noted above of not requiring "briefs" apart from the petition for hearing in the California Supreme Court, it is obvious that the place where the issue was "briefed" was in the Court of Appeal. In his parenthetical reference to the holding of Menchaca, Witkin confirms this: "plaintiffs did not raise issue in their petition for hearing but had briefed it in court of appeal; issue decided by Supreme Court". Witkin, California Procedure, 2d Ed., Appeal, § 617

The Teachers' research has uncovered no case that alters or modifies the principles represented by these authorities. It follows, therefore, that when the Teachers asked the California Supreme Court for a rehearing limited to the constitutional issues raised here, that court was not asked to decide an issue raised for the first time on appeal. The California Supreme Court clearly could have granted the rehearing consistent

with Menchaca, and apparently declined to do so because it regarded the constitutional claims as non-meritorious. The conclusion is inescapable that Petitioners' federal Equal Protection tenure and pay claims were properly before the California Supreme Court and are properly before this Court.

### C. The Teachers Did Not Affirmatively Disclaim the Constitutional Issue Raised Here

Given the considerations stated above, there is only one way in which the California Supreme Court could have been foreclosed from considering the constitutional tenure issue raised here. If the Teachers had expressly relinquished the issue after having raised it in the Opening Brief of Cross-Appellants, then the issue could have been deemed waived from consideration by the California Supreme Court.

The District so argues: "[T]he plaintiffs affirmatively disclaimed the claim which they now seek to assert." Opposition Brief, p. 18.

The District asserts that this was done in one document and one document alone: The Closing Brief of Cross-Appellants to the California Court of Appeal. Opposition Brief, pp. 18-20.

The District's contention is remarkable on a number of grounds. None of the statements quoted in the District's Opposition Brief at pp. 18-19 represents

an affirmative statement that the tenure claim is not a constitutional one! Rather than these being affirmative disclaimers at all, they are merely statements of the Teachers' statutory arguments.

The District appears to rely on its familiar non sequitur: Because the Teachers argued below for tenure on statutory grounds, they must have argued for it only on statutory grounds. A closer look, however, confirms that there was no disclaimer even by negative implication.

Even without examining the context out of which the quotations supposedly evidencing "affirmative disclaimer" were taken, it is clear that they imply nothing whatever about whether the Teachers' rights to tenure rests exclusively on statutory grounds, or on both constitutional and statutory grounds. The District contends that

> the plaintiffs framed the issue for the California Court of Appeal in such a manner as to abandon any claim that a person properly classified as temporary would be entitled to pro rata pay. Their assertion of a right to pro rata pay has always been conditioned upon their claimed status as non-temporary employees. When the California Court of Appeal found that part-time teachers...are temporary employees, no further issue, constitutional or otherwise, was before that Court with regard to such employees' entitlement to pro rata pay....

> Opposition Brief, p. 19 (emphasis added).

However, conceding for the sake of argument that any person properly classified as temporary would not be entitled to pro rata pay, and that the Teachers' claim to such pay is conditioned on their claim to non-temporary status, the Teachers' expressly claimed that such status is constitutionally required and that therefore they were not properly classified as temporary. The issue here is not whether a constitutional claim remained after the Court of Appeal found that part-time teachers are temporary; the issue is whether, consonent with the Fourteenth Amendment, the Court of Appeal could find them to be temporaries without rights to employment security and equal pay. Since the District in no way indicates how the quoted passages disclaimed (affirmatively or otherwise) this issue the central one raised in this petition for writ of certiorari, we fail to see how the waiver-by-disclaimer took place.

An understanding of the different postures of the Teachers' different claims before the Court of Appeal may make even clearer why no inference may be drawn from the "Closing Brief of Cross-Appellants" that any tenure-related issue was being abandoned.

As pointed out above, (p. 4 of this brief), the Teachers prevailed on the tenured status issue in the trial court and lost on the pro rata pay issue. The District appealed on the tenure issue,

and the Teachers cross-appealed on the pro rata pay issue.

Thus, in the Court of Appeal, the Teachers were Respondents on tenure issue and Cross-Appellants on the pay issue. Their initial brief which followed the District's first appellate brief, was accordingly titled "Opening Brief of Cross-Appellants and Reply Brief of Respondents." (This brief has been referred to here, for the sake of convenience, simply as the "Opening Brief of Cross-Appellants".) Such a combined brief was the appropriate vehicle for the Teachers both to defend the trial court's holding on tenure and to attack its holding on pay, and it was within this brief (at p. 11) that the teachers asserted their constitutional right to tenure.

The document was answered by a brief by the District titled "Appellant's Closing Brief and Reply Brief of Cross-Respondents." In this brief, the District made its final comments on the tenure issue that it had raised in the appeal (in its role as Appellant), and (in its role as Cross-Respondent) made its initial and sole comments on the pro rata pay issue.

This brief, in turn, was followed by the last brief prior to the Court of Appeal decision, the Teachers' "Closing Brief of Cross-Appellants". In it, the Teachers addressed only the pro rata pay issue. According to the California Rules of Court, a cross-appellant is allowed the last word before decision, but its remarks must be limited to the subjects

it raised in the cross-appeal. 4/

In other words, since the subject of the cross-appeal was only equal pay, California law forbid the teachers from raising any further argument on their right to tenure because that was not the subject of the cross-appeal. If the quotations adduced by the District in its "affirmative disclaimer" argument focused any issue at all, it could only have been with respect to the pay issue because the teachers could not discuss the tenure issue.

What the District claims to have been an affirmative disclaimer of the constitutional tenure claim thus represents nothing more than adherence to the elementary procedures of California appellate law.

It would be a peculiar rule, indeed, that required petitioners for certiorari to violate California's judicial procedures in order to preserve their constitutional challenge. Thus the teachers could not, and did not, disclaim their rights under California law to have the California Supreme Court consider the case "at large", including their constitutional claim to tenure.

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4/ California Rules of Court, Rule 14. Additional Briefs...(c) [Briefs on cross-appeal] When a cross-appeal is taken pursuant to rule 3, the respondent, as cross-appellant, need not file a separate brief on the cross-appeal but may include, in a separate section of his reply brief, the points he desires to raise (footnote continued)

D. The California Supreme Court's Failure to Comment on an Issue Properly Before It Does Not Preclude This Court From a Rightful Assertion of Jurisdiction Over the Constitutional Issue

The District states: "This Court Has No Jurisdiction to Decide Federal Constitutional Issues Which Were Not Raised and Decided in the California Appellate Courts." Opposition Brief, p. 24 (emphasis added). Depending on what the District means by "decided", this statement is either irrelevant or erroneous.

If by "decided" the District means only that the particular resolution of the issue was logically necessary to the action taken by the California appellate courts, then a finding of constitutionality was certainly implicit in the decisions of the California courts. As explained above, an Equal Protection Clause argument on the right to tenured status was before both California appellate courts, and they enforced an interpretation of the statute inconsistent with that claim. To do so necessarily rejected the constitutional claim.

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4/(continued from page 14) on his cross-appeal.

The appellant, as cross-respondent, may reply thereto in a separate section of his reply brief, and the cross-appellant may file a reply brief confined to points on his cross-appeal. (Emphasis added.)

If, on the other hand, the District means that the state court must expressly decide the issue, this is obviously wrong. Were it not so, any state court could immunize its decisions from the review of this Court by the simple expedient of refusing to discuss a federal constitutional issue raised by the parties. The impotence of state courts to so negate the Constitution of the United States has been recognized on a number of occasions. Chambers v. Mississippi, 419 U.S. 284, 290 n. 3 (1973) (see quotation, supra this brief n. 1); Street v. New York, 394 U.S. 576, 581-82 (1969).

## II. THE PETITION PRESENTS SUBSTANTIAL CONSTITUTIONAL ISSUES CONCERNING THE STANDARD OF REVIEW TO BE APPLIED TO A CLASSIFICATION THAT BEARS ON DUE PROCESS RIGHTS AND ACADEMIC FREEDOM AND THE REASONABLENESS OF THE CLASSIFICATION

### A. A Classification That Permits State Agencies to Foreclose Some College Teachers From Ever Being Accorded Due Process Rights Must Be Substantially Related to Important Governmental Objectives

In light of the District's comments on the Teachers' constitutional arguments, it may be useful to sharpen the issues, by pointing out what is not involved in this Petition for Certiorari.

First, the Teachers do not argue that part-time college teachers--let

alone "temporary" ones--are a suspect classification, requiring that any legislation affecting them must be necessary to achieving a compelling state interest.

Second, the Teachers do not argue that the right of government employees to tenure is a fundamental right, such that classifications affecting it require a similar level of strict scrutiny.

Third, the Teachers do not argue that any of them has been directly denied Due Process of Law or Freedom of Speech.

Finally, the Teachers do not argue that classifications affecting such teachers must be subject to an intermediate level of scrutiny because the category of "temporary part-time teachers" can, in some way, be likened to gender classifications.

The Teachers have argued that the values they seek to protect fall within the penumbras of the Due Process Clause and the First Amendment; that these values occupy a preferred position compared with mere economic interests; and that therefore when a state classifies teachers in such a way that some are accorded rights related to these values and others are denied such rights, the classification must be substantially related to important governmental objectives.

The Teachers may or may not have a constitutional right to due process

before being terminated. 5/ The fact that the question is open to serious dispute suggests, however, that the rights of these teachers may at least approach constitutional dimensions. Moreover, tenure rights of college teachers--whether statutory or constitutional--clearly protect academic freedom, which this Court has said is "a special concern of the First Amendment", Keyishian v. Board of Regents of New York, 385 U.S. 589, 603, (1967).

These interests, whether constitutionally protected or not, are sufficiently important that when a state chooses to accord such rights and protections to some employees, its decision not to accord them to others must be subject to more than rational basis scrutiny. For another example of this Court holding that statutory rights, not themselves guaranteed by the Constitution of the United States, must be allocated in accordance with the Equal Protection Clause, see Griffin v. Illinois, 351 U.S. 12, 18 (1956)

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5/ The case cited by the District, Opposition Brief, p.33 n.23, in opposition to such a right, Haimowitz v. University of Nevada, 579 F.2d 526 (9th Cir. 1978), may or may not support their position, depending on what constitutes "extraordinary circumstances". For example, the existence of an actual policy on the part of the District, as found in Balen v. Peralta Junior College District, 11 Cal.3d 821, 830, 114 Cal. Rptr. 589, 523 P.2d 629 (1974), of routinely terminating part-time teachers with the actual expectation of repeatedly re-hiring them, creates a constitutionally-protected expectation even under Haimowitz. Furthermore, Johnson v. Fraley, 470 F.2d 179, 181 (4th Cir. 1972) (footnote continued)

(no constitutional right to appeal criminal conviction, but if right given, by state law, may not effectively deny on grounds of indigence).

The appropriate standard of review in the instant case is the one used in the gender cases, not because the Teachers belong to a group which can be likened to women, but because the values at stake here are such that their denial calls for more than rational basis review. See also Trimble v. Gordon, 430 U.S. 762, 767 (1976) (scrutiny of classifications involving illegitimacy "is not a toothless one").

This Court ought to decide what standard of review is warranted by the interests involved in this dispute.

B. The Denial of Tenurial Rights to All Part-Time Teachers is Irrational and Arbitrary, and a Denial of Equal Protection of the Laws, Even When Mediated by the Word-Magic of Calling Them "Temporary"

The statute at issue here requires local community colleges to classify part-time faculty as "temporaries", without rights, in perpetuity, or at least permits them to do so, regardless of

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5/ (continued from page 18) supports the proposition that "continuous employment over a significant period of time...can amount to the equivalent of tenure." Petition, p. 14. The District has not commented on that case.

the colleges' actual intent to employ these teachers on a permanent basis. 6/

The California Supreme Court found, in Balen v. Peralta Junior College District, supra, that the purposes of the system of teacher classifications were to allocate rights to teachers "with positions of a settled and continuing nature", while allowing the Districts to meet their short-term needs with substitute and temporary teachers. 11 Cal. 3d at 826. (Balen was distinguished, in other respects, by the California Supreme Court in the decision below, but not overruled.)

The District now argues that the need for administrative flexibility requires the ability to discharge teachers without notice. Insofar as this may be a legitimate need, and even assuming for the sake of argument that it is an important one, the Equal Protection Clause requires that

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6/ The District insists that the statute only applies to initial classifications of a person working carrying less than 60% of full load, quoting the California Supreme Court. Opposition Brief, p. 6. Nothing in the statute suggests that persons employed carrying less than 60% of a full load can ever achieve tenure status. And the California Supreme Court said nothing in the statute required ever reclassifying these employees as other than temporary. Appendix, pp. 14-15. In any event, the District has availed itself of the "right" to continue the "initial" classification of "temporary" for as long as ten years, Petition, p.26, so the constitutional issue does in fact exist.

the means for meeting these needs not be arbitrary. As our analogy in the Petition, p. 25, suggests, even a system which excluded teachers with names beginning "A" to "M" from the benefits of tenure would contribute to fulfilling the requirements of administrative flexibility. (And, in fact, probably a substantial proportion of those individuals would be "true temporaries".) But such a classification would not meet the requirements of the Fourteenth Amendment because it would be an arbitrary classification. Not only must there be a reason to believe that a classification will meet the state's legitimate interests, but the classification must do so in a manner that itself is fair. Given the overall needs and multiple purposes of the teacher classification system, denying rights to all part-time teachers (and labelling them as "temporaries") is arbitrary and irrational. Petition, pp. 24-27.

The District has made no effort to explain why, beyond the arbitrary compromise to which the Teachers have drawn attention, Petition, pp. 23-25, it is reasonable to have placed the burden of administrative flexibility on these teachers. Their sole answer appears to be that this Court must defer to the legislature, regardless, evidently, of the arbitrary character of the classification.

## CONCLUSION

For all of the above reasons, as well as those stated in the Petition

for Writ of Certiorari, the Petition should be granted and the Writ should issue.

Respectfully submitted,

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November 19, 1979